



University of Connecticut  
**OpenCommons@UConn**

---

Faculty Articles and Papers

School of Law

---

2010

# Liberalism's Ambivalence

Anne Dailey

*University of Connecticut School of Law*

Follow this and additional works at: [https://opencommons.uconn.edu/law\\_papers](https://opencommons.uconn.edu/law_papers)



Part of the [Law and Philosophy Commons](#), and the [Law and Psychology Commons](#)

---

## Recommended Citation

Dailey, Anne, "Liberalism's Ambivalence" (2010). *Faculty Articles and Papers*. 158.

[https://opencommons.uconn.edu/law\\_papers/158](https://opencommons.uconn.edu/law_papers/158)

# HEINONLINE

Citation: 28 QLR 617 2009-2010



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Mon Aug 15 16:50:08 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=1073-8606](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1073-8606)

## LIBERALISM'S AMBIVALENCE

Anne C. Dailey\*

In *Liberalism in Love*, Nomi Stolzenberg paints a compelling portrait of the enduring tension between rationalist and romantic versions of liberalism.<sup>1</sup> Her essay is a thoroughly engaging and brilliant uncovering of this conflict at the heart of twenty-first century liberalism.<sup>2</sup> As she describes it, rationalist liberalism views the world and the individual psyche as properly governed by reason.<sup>3</sup> In contrast, romantic liberalism considers at least some spheres of human activity and certain arenas of the psyche as properly ruled by the passions.<sup>4</sup> We are accustomed to thinking about law as a rationalist liberal enterprise committed to the ideals of individual autonomy and reasoned deliberation. Stolzenberg's essay exposes the surprising extent to which romantic ideas about human experience and the self have penetrated American legal discourse over the past century.<sup>5</sup> Her project explores the implications of this romantic encounter with the rationalist liberal enterprise.<sup>6</sup>

Although weakened, rationalist liberalism still maintains a steady hold on our conception of the public sphere. Where romanticism has staked its dominance is in the realms of intimate relationships and spirituality. It is in these spheres of human experience that we see the flowering of romantic ideas about individual freedom, self-expression, free love, spiritual transcendence, and the whole structure of ideas surrounding privacy and autonomy in modern liberal legal thought. We might extrapolate from Stolzenberg's thesis that the First Amendment and the Due Process Clause are two important constitutional pillars of this distinctly romantic conception of the self and intimate activity.<sup>7</sup>

---

\* Evangeline Starr Professor of Law, University of Connecticut School of Law.

1. Nomi Maya Stolzenberg, *Liberalism in Love*, 28 QUINNIPIAC L. REV. 593 (2010).

2. *Id.*

3. *Id.* at 593-94.

4. *Id.*

5. Stolzenberg, *supra* note 1.

6. *Id.*

7. *Id.*

The 1943 decision in *West Virginia State Board of Education v. Barnette*<sup>8</sup> was the Supreme Court's first bold stance against "orthodoxy" in matters of religion.<sup>9</sup> The decision in *Griswold v. Connecticut*<sup>10</sup> played the same role with respect to the protection for family life and marriage.<sup>11</sup> Romanticism arguably reached its apex in *Lawrence v. Texas*,<sup>12</sup> where the Court overturned precedent to recognize free love as a protected site of individual liberty.<sup>13</sup> In all these areas, as Stolzenberg tells us, liberalism in love means a state of radical legal deregulation.<sup>14</sup>

Liberalism in a state of love not only demarcates certain spheres of romantic experience, but it also presents us with an alternative conception of the self. Rational liberalism provides us with an ideal of the autonomous, rational, choosing actor, Stolzenberg explains, whereas romanticism offers a competing conception of the ideal self as liberated from the constraints of reason. Stolzenberg's argument here leads me to wonder whether the rise of romantic liberalism was reflected in, and perhaps even fueled by, the spread of psychoanalytic ideas in the early twentieth century. Sigmund Freud's *Libido Theory* fits perfectly with a penchant for free love—if we can remove the repressive factors inhibiting sexual desire, then we will resolve neurotic symptoms and increase the individual's direct and unconflicted experience of the passions.<sup>15</sup> To the extent rationalism has yielded to romantic psychology, what results is an essentially psychoanalytic vision of human freedom as throwing off the repressive constraints of reason, an opening up to the creativity, spontaneity, and transformative potential of the state of love. As Stolzenberg tells it, romantic liberalism promises us "freedom in matters of the heart" as we have come to understand it psychologically over the past century and a half.<sup>16</sup>

---

8. 319 U.S. 624 (1943).

9. *Id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .").

10. 381 U.S. 479 (1965).

11. *Id.* at 484-86.

12. 539 U.S. 558 (2003).

13. *Id.* at 578 ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

14. Stolzenberg, *supra* note 1, at 609.

15. Sigmund Freud, *The Libido Theory* (1922), reprinted in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 255 (James Strachey ed. & trans., 1955).

16. Stolzenberg, *supra* note 1, at 610.

So we may conclude that in certain spheres of experience—familial, sexual, and spiritual—we are all Romantics now.

Well, not quite all of us.

Romanticism has met with considerable resistance, both in psychology and law, and it is Stolzenberg's task to document this enduring conflict. In psychology, the cognitive/behavioral revolution has brought about a dramatic decline in the prominence of psychoanalytic research and therapy.<sup>17</sup> Moreover, the work of these cognitive psychologists now exerts a powerful influence on legal scholarship as well. Behavioral legal studies promotes a vision of individual rationality in almost every area of social life, including marriage.<sup>18</sup> Rationalism maintains a strong hold on constitutional law as well. Many decisions protecting free expression and individual autonomy actually emphasize decisional freedom, the right of the individual to choose how to live his or her life.<sup>19</sup> Decision-making autonomy is closely associated with many rights in a liberal state, including the rights to vote, to freedom of speech, and to personal liberty in matters relating to marriage, reproduction, and childrearing. Children are denied constitutional rights—even in the sphere of the family—on the ground that they are not “fully rational, choosing agent[s].”<sup>20</sup> The strong imprint of rationalism still exists even at the heart of modern legal notions of the self and personal freedom.

This enduring conflict between rationalism and romanticism is a struggle over the soul of liberalism, as Stolzenberg puts it.<sup>21</sup> All I can add to her fascinating exposition of this struggle is a slightly different perspective on what it means. I want to suggest here that the relationship between rationalism and romanticism is not necessarily a conflict between two opposing views of human experience and selfhood. It is, at bottom, an ambivalence. In other words, the cognitive/behavioral assault on romanticism should not necessarily be quickly diagnosed as a defensive maneuver, a rationalist attempt to ward off romanticism and to repress the romantic psyche and its passions. Instead, the continuing viability of rationalist ideas about the self may

---

17. See Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175 (2010).

18. See *id.*

19. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (“After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”).

20. *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988).

21. Stolzenberg, *supra* note 1.

reflect a deep and inescapable psychological truth: an ambivalence which actually allows romantic experience to emerge and flourish.

In what follows, I elaborate what it means to think about the relationship between rationalism and romanticism as a necessary ambivalence rather than a confrontation between two worldviews.

The freedom, excitement, and growth that can accompany throwing off the constraints of reason are enticing, seductive even. Again, we are all at least aspiring romantics. But we must not overlook the dangers of a sphere of personal experience without the constraints of reason, where repression is lifted and anything goes, where free love is the paradigm of human liberty. I am not necessarily referring to the costs to human relationships when we elevate flirtation over commitment, as Adam Phillips would advocate.<sup>22</sup> I am not warning about a world without loyalty and duty and reliability, all values arguably sacrificed by romantic flights of passion. It is not just that romanticism has its costs, but that it actually offers a much darker portrait of the pleasures of the state of free love itself. The state of love may not always be the liberating, freedom-enhancing, or gratifying experience we assume it to be. This is its idealized version, its "romanticized" version. Again, it is not just because free love sacrifices the value of commitment or that changes of heart can injure as well as rejuvenate. Rather, this darker portrait yields two more fundamental concerns.

First, the romantic psyche is one that flirts with, and sometimes succumbs to, aggressive, hateful, self-destructive feelings. These aggressive impulses or drives define one of the core dangers of romanticism, the possibility of domination, of sexual conquest, of submission to a more powerful figure, of self-annihilation. Early in his thinking, Freud identified the existence of sadistic feelings in young children struggling to master their oedipal frustrations and fears.<sup>23</sup> Freud revised his pleasure-seeking theory of the libidinal drives in the aftermath of World War I, when he came to realize that something more was operating in the realm of the unconscious than just the drive for sexual gratification.<sup>24</sup> He called this aggressive impulse the "death

---

22. ADAM PHILLIPS, ON FLIRTATION (1994).

23. See Sigmund Freud, *Three Essays on Sexuality* (1905), reprinted in 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 125 (James Strachey ed. & trans., 1953).

24. See Sigmund Freud, *Beyond the Pleasure Principle* (1920), reprinted in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, *supra* note 15, at 1.

instinct”<sup>25</sup> and, although later analysts have conceptualized aggression in different ways,<sup>26</sup> the existence of intense aggressive and sadistic feelings has been a central thread in psychoanalytic thinking from the beginning. Analysts believe that, through the exercise of reason, an individual can get some measure of control over these dark and potentially self-destructive aspects of the psyche.<sup>27</sup> Despite all its grappling with the realm of unconscious desires and instinctual drives, then, psychoanalysis is a discipline founded on the traditional rationalist principle that it is through the exercise of reason, of interpretive understanding, that an individual can understand and master the darker elements of the mind.<sup>28</sup>

We have to be wary that romantic liberalism offers only the false hope of instinctual gratification, a “transference cure,” as the psychoanalysts call it.<sup>29</sup> A cure, in other words, that satisfies our longings for love, our idealized notions of the power of love to rescue us from our darker feelings, our hope that the incestuous love of the analyst will finally bring us the peace and happiness we are seeking. We long for this without realizing that this cure through love might leave untouched the aggressive, rageful, and narcissistic feelings still operating below the surface of awareness. Falling in love brings real danger, as advocates against domestic violence know well, but it brings psychological danger as well. Rationalism and its regulatory regime can thus serve to protect us against the dangers posed by the unleashing of romantic passions, by what Stolzenberg calls the state of being in love.<sup>30</sup>

Rationalism may be necessary to the romantic psyche in a second, more fundamental way as well. The romantic poets clearly understood the reality of psychological fragility, that too great an entry into the world of the passions cannot only expose aggression, but can fundamentally destabilize the psyche.<sup>31</sup> They knew well that romantic creativity can border on madness; they lived it themselves. When we celebrate free love, we may be celebrating the passionate intensity that comes with a certain loss of boundaries and selfhood, that glorious

---

25. *Id.* at 54.

26. *See, e.g.,* MELANIE KLEIN, *THE SELECTED MELANIE KLEIN* (Juliet Mitchell ed., 1987).

27. *See* Freud, *supra* note 24.

28. *See id.*

29. FRANZ ALEXANDER ET AL., *PSYCHOANALYTIC THERAPY: PRINCIPLES AND APPLICATION* 133 (Bison Book 1980) (1946).

30. Stolzenberg, *supra* note 1.

31. KAY REDFIELD JAMISON, *TOUCHED WITH FIRE: MANIC-DEPRESSIVE ILLNESS AND THE ARTISTIC TEMPERAMENT* (1995).

feeling of oneness with the other and the world, a dizzying freedom from the stultifying effects of ordinary life. But falling in love also brings the possibility that one's hold on reality will weaken as idealization, obsessional thinking and irrational jealousy take over. Here the worry is not so much a mind vulnerable to domination, to annihilation by aggressive forces, but instead a fragile ego, one vulnerable to disorder and fragmentation, to what analysts call regression.<sup>32</sup> Loss of sanity rather than aggression is the primary threat to the ego here.

I am suggesting that we move too quickly to the view that rationalism is always an assault on the romantic soul, that it is a symptom of anxiety about our own madly passionate natures, or that it is a flight from love. Instead, rationalism may have its adaptive side, one that seeks to reinforce the ego structures needed to experience the passionate intensity of human emotions. It is possible to see rationalism not as an escape from romanticism, not as a defensive maneuver to protect the self from the excesses of desire, but instead as an effort to master, to fully experience, our passionate natures.

We can see clearly the individual's vulnerability to psychological fragmentation in two contexts. First is the psychoanalytic setting. Psychoanalysis cannot be utilized well in situations where individuals suffer from problems related to weak ego structures because the regressive pull of the analytic situation will overwhelm them. These patients will sometimes be unable to mobilize reasoned thinking to control and contain the transference feelings and fantasies. They will no longer think that the analyst is emotionally distant like their father; they will believe that the analyst actually is their father. This does not mean that psychoanalysis cannot be beneficial in these circumstances, but only that psychoanalysis may be doing something different for patients in need of ego fortification.

The threat of ego fragmentation is also on display in childrearing. Although we raise children in an atmosphere of unconditional love, this does not mean an atmosphere of free love. Indeed, a total lack of discipline, stability, and structure would have disastrous psychological consequences for a young child. Children need to internalize the elements of a stable and organized world in order to build up basic psychological structures that can order and integrate the irrational parts of human experience. Paradoxically, children require discipline in order

---

32. See, e.g., Sydney E. Pulver, *The Psychoanalytical Process and Mechanisms of Therapeutic Change*, in *PSYCHOANALYSIS: THE MAJOR CONCEPTS* 81, 87 (Burness E. Moore & Bernard D. Fine eds., 1995).



that they may become adults capable of romantic flights of passion. Language acquisition is a paradigmatic example of the role of rationalism in making the romantic life possible. The rational rules of grammar produce scientific thinking, but also poetry.

Rationalism will not make us poets or lovers, but it may provide some of the psychological tools we need to harness the creative and transformative energies of the romantic psyche. Nomi Stolzenberg's marvelous essay moves us to think about liberalism in love as a deeply ambivalent state, one defined not by the opposition between reason and passion, but by their mutual interdependence.

